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### Finding Substance in the FCC's Policy of "Substantial Service"

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# Finding Substance in the FCC's Policy of "Substantial Service"

Jennifer Prime \*

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## I. INTRODUCTION

What is “service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal”?<sup>1</sup> It is the Federal Communication Commission’s (“FCC” or the “Commission”) definition of “substantial service.” This Note attempts to make sense of this vaguely articulated, but significant, concept. In recent years, the Commission has aggressively moved to promote the policy of flexible use of the electromagnetic spectrum. In conjunction with this policy, the Commission has used the “substantial service” construct in a variety of contexts, including the auction of commercial radio services.

An FCC license is a valuable asset, but it exists only for a limited duration. Therefore, obtaining a license renewal is vital to a licensee, especially one who has participated in an auction and made substantial investments in order to obtain the rights the license confers. The economic incentive in obtaining a renewal encourages license holders to do everything they can to ensure that they retain their licenses. This Note describes how a licensee can obtain a renewal expectation for commercial radio services and focuses in depth on the “substantial service” requirement and how this requirement is linked to the FCC’s policy of flexible use.

The term “substantial service” has become a common fixture in FCC renewal requirements and is identified as an important factor in the promotion of flexible spectrum use.<sup>2</sup> This Note addresses the meaning of flexible use and the potential problems that arise when “substantial service” requirements are used to promote flexible use. The policy of flexible use is centered on the idea of allowing licensees, rather than the FCC, to decide how to use the spectrum they are allocated. One of the most compelling arguments for this policy is that the market drives spectrum to its highest and best use. This Note examines the FCC’s current practice of using “substantial service” and explores whether this policy achieves a market-based approach to regulation.

This Note identifies two potential questions that arise when “substantial service” is combined with flexible use: First, is “substantial service,” as applied, too ambiguous for licensees to know with certainty that their licenses will be renewed? This question is particularly important because of the substantial investment licensees make in acquiring and building out their licenses. One alternative approach is to return to

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1. 47 C.F.R. § 22.940(a)(1)(i) (2002).

2. Gregory J. Rosston & Jeffrey S. Steinberg, Using Market-Based Spectrum Policy to Promote the Public Interest 9 (1997), *available at* [http://www.fcc.gov/Bureaus/Engineering\\_Technology/Informal/spectrum.wp](http://www.fcc.gov/Bureaus/Engineering_Technology/Informal/spectrum.wp).

specifically announced construction benchmarks. These are set requirements that a licensee must meet to maintain its license, such as service to a specific geographic area or service to a specified percentage of the population. Second, can "substantial service" be validly applied under current law? For example, is "substantial service" consistent with the goals of the Communications Act of 1934, as amended (the "Act"),<sup>3</sup> or, if a licensee is denied a renewal because it did not meet the "substantial service" requirement, was it provided notice as required by the Administrative Procedure Act? These potential problems may best be solved legislatively by eliminating the necessity that a licensee must demonstrate compliance with service requirements.

## II. THE PROCESS OF LICENSE RENEWAL

The Act requires the FCC to allocate spectrum use by grant of license. These licenses are issued for a limited duration, and "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."<sup>4</sup> In the past, the FCC's process of granting initial licenses included comparative hearings and lotteries.<sup>5</sup> Currently, the FCC grants many initial licenses by auction. In an auction, potential licensees bid against each other for the license. The auction system is based on the idea that the person willing to spend the most money on the license will use the license productively.

In contrast to initial licensing, there is a different set of objectives to be considered in renewal licensing. These objectives include encouraging licensees to make effective use of the spectrum and providing licensees with a way to have some certainty that their licenses will be renewed. Further, an initial suitability screening of the licensee is not required in renewal proceedings because this task was completed when the initial license was granted.

Performance requirements are significant components of the license process. These are specific obligations imposed on licensees by the FCC. One such performance requirement is a construction benchmark, which requires a licensee to meet specified build-out requirements. "Substantial service" is another type of performance requirement.

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3. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

4. 47 U.S.C. § 301 (2000).

5. In a comparative hearing, the FCC evaluates potential licensees based on their proposed use of the spectrum they seek. In a lottery, the FCC randomly selects the licensee from a pool of qualified applicants.

As applied by the FCC, construction benchmarks can either call for the building of a communications infrastructure or require service to a specified percentage of the population.<sup>6</sup> In the context of commercial radio services, the Commission has retreated from the traditional numerical and geographic benchmarks and has increasingly embraced “substantial service” as an alternative means of meeting performance requirements.<sup>7</sup> In contrast to clear standards set forth in construction benchmarks, a “substantial service” requirement offers this guidance: “service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant a renewal.”<sup>8</sup>

In conjunction with “substantial service” the Commission has introduced the concept of “safe harbors.” Safe harbors are determined by the FCC and are similar to construction benchmarks. They mirror specific build-out requirements insofar that they provide licensees with certainty that the licensee has met the performance requirement.

Unlike construction benchmarks, however, a licensee can choose to follow or not follow the safe harbor example as a means of meeting a performance requirement.

Performance requirements are particularly relevant in the renewal process. To provide licensees with renewal security, the FCC has established a process for reviewing renewal applicants’ past performance.<sup>9</sup> The factor that is considered “most important” in a comparative renewal proceeding is a renewal expectancy.<sup>10</sup> Obtaining a renewal expectancy allows a licensee to better demonstrate that it should be granted continued use of the spectrum. Therefore, a renewal expectancy is vital to a licensee.

The FCC has used performance requirements to determine if a renewal expectancy is warranted. To obtain a renewal expectancy, the licensee must demonstrate that it has provided service which fulfills the performance requirement, has substantially complied with the applicable FCC rules and policies, and has substantially acted in compliance with the Act.<sup>11</sup> To make this showing, the licensee must submit documents

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6. See Facilitating the Provision of Spectrum-Based Servs. to Rural Areas and Promoting Opportunities for Rural Tel. Cos. To Provide Spectrum-Based Servs., *Notice of Inquiry*, 17 F.C.C.R. 25554, para. 9 (2002) (citing 47 C.F.R. § 90.769(a) (2002)) [hereinafter *Facilitating Spectrum-Based Services*].

7. See 47 C.F.R. § 22.940 (a)(1)(i).

8. *Id.*

9. See *id.* This citation refers to the criteria established in comparative cellular renewal proceedings. This procedure and the criteria are almost identical to the other commercial radio services discussed in this Note.

10. *Id.* § 22.940 (a).

11. See *id.* § 22.940 (a)(1)(ii).

explaining why renewal expectancy should be granted.<sup>12</sup> The following are examples, from the cellular service rules, of the types of descriptions and records that, at a minimum, the licensee must provide: (1) an assessment of the geographic coverage and the amount of people served, (2) a description of the its expansion record, (3) the amount of money invested in its service network, (4) a copy of any FCC orders that indicate that it violated the Act or FCC rules or policies.<sup>13</sup>

There are other aspects of licensing for which performance requirements are relevant. For example, a licensee could lose its license in the middle of a license term for failing to comply with a construction benchmark. In addition, Section 309(j) of the Act requires the Commission to set certain performance requirements for commercial radio licenses granted by auction. This Note focuses on commercial radio services, which are generally subject to the 309(j) requirements. For these services, the Commission is increasingly using “substantial service” to satisfy the performance requirement. Because the meaning of “substantial service” is not clear, but is so vital in the license process, it is insightful to examine the history of how and in what contexts the FCC has used this term.

### III. “SUBSTANTIAL SERVICE”

#### A. *History and Origin*

The term “substantial service” has been used in many contexts and in regard to many different types of licenses. In 1933, the term was used to describe the type of service a radio licensee offered to the public.<sup>14</sup> More recently, in the context of comparative hearings for broadcast licenses, the FCC used the term “substantial service” to describe performance by a licensee that would be counted in their favor during a comparative hearing renewal procedure.<sup>15</sup> In its most recent reincarnation, “substantial service” is being used as a performance requirement in many commercial radio services.

The origins of the current definition can be traced to disputes regarding fairness issues in the comparative hearing process for broadcast licensees. In *Citizens Communication Center v. FCC*,<sup>16</sup> the Citizens

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12. See *id.* § 22.940 (a)(2).

13. See *id.*

14. See *New York Dep’t of Plant & Structures v. Fed. Rad. Comm’n*, 64 F.2d 719 (D.C. Cir. 1933).

15. See *Brdcst. Renewal Applicant, Further Notice of Inquiry*, 31 F.C.C.2d 443, para. 4 (1971) [hereinafter *1971 Brdcst. Renewal*].

16. *Citizens Comm. Ctr. v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971). Comparative

Communication Center and other parties challenged the process of favoring renewal applicants over new applicants. The D.C. Circuit determined that past performance could be used as a positive factor in favor of the incumbent licensee.<sup>17</sup> The FCC used the term "substantial service" to indicate the type of past service that would warrant a "plus of major significance."<sup>18</sup> In response to the Court's concern over the preferences given to renewal applicants over new applicants, the FCC stated that "substantial service" was used in the sense of "'strong, solid' service—substantially above the mediocre service which just minimally warrants renewal."<sup>19</sup> A few years after the FCC announced this definition, the Commission requested comments on whether quantitative standards should be used to clearly define "substantial service."<sup>20</sup>

The FCC stated that establishing "definitive guidelines for the concept of substantial service is fundamentally sound."<sup>21</sup> The Commission had several concerns about how to formulate definitive guidelines: to which area of broadcasting licensees the guidelines should apply, how the guidelines should be defined for each category of licensee, and whether the numerical figure should be expressed as a percentage range.<sup>22</sup> The FCC rejected the idea of clarifying the term and stated that defining it as a numerical standard would not offer licensees, new applicants, or the public "any significantly greater certainty as to what level of performance would constitute substantial service."<sup>23</sup> The Commission only addressed whether numerical standards should be associated with the term and did not

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hearings were held to determine who should receive a license. The Commission had a difficult time formulating a process of preferring the incumbent licensee over the new licensee that the court would find acceptable.

17. *Id.* at 1213.

18. 1971 *Brdcast. Renewal*, *supra* note 15, para. 4.

19. *Id.* (citing Pol'y Statement Concerning Comparative Hearings on Renewal Applicants, 22 F.C.C.2d 424, 424 n.1, 18 Rad. Reg.2d (P & F) 1901 (1970) [hereinafter *Comparative Hearings*]).

In short, we would distinguish between two types of situations—one where the licensee has served the public interest but in the least permissible fashion still sufficient to get a renewal in the absence of competing applications (defined herein as minimal service) and the other where he has done so in an ample, solid fashion (defined herein as substantial service).

*Id.*

20. *Brdcast. Renewal Applicant, Second Further Notice of Inquiry*, 43 F.C.C.2d 367, para. 2 (1973).

21. *Id.* para. 5.

22. *Id.*

23. *Deregulation of Radio, Report and Order Proceeding Terminated*, 84 F.C.C.2d 968, para. 40, 49 Rad. Reg.2d (P & F) 1 (1981) (citing *Brdcast. Renewal Applicant, Report and Order*, 66 F.C.C.2d 419, para. 18, 40 Rad. Reg.2d (P & F) 763 (1977)).

comment on some other representative definition.<sup>24</sup> The FCC also pointed out that a showing of "substantial service" would not guarantee the licensee a renewal.<sup>25</sup>

Many of the Commission's policy reasons for not clarifying the term "substantial service" as applied to broadcast licenses do not apply to "substantial service" as applied to commercial radio services. First, in commercial radio service renewal proceedings, "substantial service" is determinative. Second, the FCC resisted setting broadcasting criteria that would be applied nationally. This concern is specific to broadcasting and does not apply to commercial radio services, which encompass many different technologies to serve the public in many different ways. Further, unlike commercial radio services, broadcast licensing inherently focuses on local community needs.<sup>26</sup>

The FCC no longer uses the types of comparative hearings used in broadcasting. Despite the noted confusion over the meaning and proper use of the term, "substantial service" has reappeared as a performance requirement in commercial radio services. It carries with it new weight. The service rules dictate that a licensee must meet the performance requirements in order to obtain a renewal expectancy. If the licensee does not have clear standards, then the licensee faces uncertainty that the service it is providing will warrant a renewal. Unfortunately, the definition currently associated with "substantial service" is largely unchanged from the definition used in broadcast license renewals.<sup>27</sup>

The Commission has recognized, in the context of the 24 GHz service, that the current definition of "substantial service" does not provide much guidance, and it has further noted that as "a result of the flexibility that this standard affords, we have, in past proceedings, provided safe harbor examples to provide guidance to licensees in meeting this

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24. *Id.*

25. *Id.* para. 40. "Even a clear history of substantial service would not guarantee renewal, since any preference awarded for it cannot terminate the hearing in favor of the incumbent licensee." *Id.* These types of comparative hearings involved a hearing of competitors for the license. The incumbent could receive favorable preference, but it was not determinative. The FCC no longer uses these types of hearings.

26. See, e.g., *Renewal of Brdcst. Licenses, Memorandum Opinion and Order*, 44 F.C.C. 2d. 405, para. 63, 29 Rad. Reg.2d (P & F) 1 (1973).

27. The striking similarity is most easily viewed by comparing both definitions. The current definition is "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal." 47 C.F.R. § 22.940(a)(1)(i). The 1971 description is "'strong, solid' service—substantially above the mediocre service which might just minimally warrant renewal." 1971 *Brdcst. Renewal*, *supra* note 15, para. 4 (citing *Comparative Hearings*, *supra* note 19, at 425 n.1).



requirement.”<sup>28</sup> A safe harbor is a set example, provided to licensees by the FCC, of service that will warrant renewal. Safe harbors help alleviate a licensee’s potential anxiety about providing “substantial service.” However, they stand in direct opposition to the flexibility “substantial service” is intended to provide.

The problem with safe harbors is they do not promote flexibility; rather, they provide a static example of the kind of service a licensee can safely provide. The safe harbor option may be especially attractive to licensees because of the value of a license renewal. Therefore, it may be less likely that a licensee will take advantage of the flexibility “substantial service” provides. Further, safe harbors do not promote new and innovative technologies. They encourage a licensee to provide a service or build-out requirement that has already proved successful. Finally, safe harbors function much like numerical or geographical benchmarks. They provide a specific example of build-out requirements, or they dictate a percentage of the population to be served.<sup>29</sup> Avoiding these types of rigid requirements was one of the motivations for adopting the policy of “substantial service.” Therefore, the policy of “substantial service” may not effectively promote the Commission’s goals so long as safe harbors are provided.

#### *B. “Substantial Service” as Applied to Commercial Radio Services*

Recently, the Commission has applied a “substantial service” requirement to a variety of services including broadband Personal Communication Services (“PCS”),<sup>30</sup> cellular,<sup>31</sup> Local Multipoint Distribution Service (“LMDS”),<sup>32</sup> Wireless Communications Services (“WCS”),<sup>33</sup> Advanced Wireless Services (“AWS”),<sup>34</sup> 39 GHz, 218-219 MHz,<sup>35</sup> and Multichannel Video Distribution and Data Service

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28. Amendments to Parts 1, 2, 87 and 101 of the Comm’n’s Rules To License Fixed Servs. at 24 GHz, *Report and Order*, 15 F.C.C.R. 16934, para. 38, 21 Comm. Reg. (P & F) 827 (2000) [hereinafter *Fixed Services at 24 GHz*]. An example of a safe harbor, for the 24 GHz point-to-point/multipoint licensee “may consist of a showing of four links per million population within a service area or service to an area that has very limited access to either wireless or wireline telecommunications services.” *Id.* (footnote omitted).

29. *Id.*

30. 47 C.F.R. § 24.16(a) (2002).

31. *Id.* § 22.940(a)(1)(i).

32. *Id.* § 101.1011(a).

33. *Id.* § 27.14(a).

34. See Serv. Rules for Advanced Wireless Servs. in the 1.7 GHz and 2.1 GHz Bands, *Report and Order*, 18 F.C.C.R. 25162, para. 75 (2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-251A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-251A1.doc).

35. 47 C.F.R. § 95.833(a) (2002).

("MVDDS").<sup>36</sup> The Commission cites several reasons for applying a "substantial service" performance requirement to commercial radio services, including "[ensuring] that the spectrum is used effectively and that service is deployed rapidly."<sup>37</sup> More importantly, Congress requires the FCC to mandate requirements that include performance deadlines as well as penalties for failing to perform.<sup>38</sup> These requirements exist to ensure that service promptly reaches rural areas, to prevent the stockpiling or warehousing of spectrum, and to spur rapid investment in and deployment of new and emerging technologies and services.<sup>39</sup>

The FCC has cited many reasons for using the policy of "substantial service" as the performance requirement in commercial wireless services. This policy is flexible, allowing the FCC to gauge the licensee's performance by a measure that is not based on a percentage of the population service or by geographic requirements.<sup>40</sup> The Commission views "substantial service" as "a mechanism to foster rapid development of spectrum."<sup>41</sup> The FCC established the policy "for circumstances where the Commission has determined that more flexible construction requirements rather than fixed benchmarks would more likely result in the efficient use of spectrum and the provision of service to rural, remote, and insular areas."<sup>42</sup>

There are two policy goals—service to remote and rural areas, and service to niche markets—for which "substantial service" does seem appropriate. The Commission is required to promote service to rural America.<sup>43</sup> Moreover, the FCC's goal is to ensure that consumers living in rural areas have access to service with rates comparable to those provided to urban residents.<sup>44</sup> Sparse population provides a disincentive for licensees to serve rural areas as it does not provide the same revenue base as does the dense population of urban areas. To counteract this problem, the FCC uses "substantial service" as a tool to promote sharing of the spectrum with rural

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36. *Id.* §101.1413(a)-(b).

37. *Fixed Services at 24 GHz*, *supra* note 28, para. 36.

38. 47 U.S.C. § 309(j)(4)(B) (2000).

39. *Id.*

40. Amendment of the Comm'n's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rule Making*, 12 F.C.C.R. 18600, para. 42, 10 Comm. Reg. (P & F) 353 (1997).

41. *Fixed Services at 24 GHz*, *supra* note 28, para. 36.

42. *Facilitating Spectrum-Based Services*, *supra* note 6, para. 9.

43. 47 U.S.C. §309(j)(4)(B) (2000).

44. Press Release, FCC, FCC Asks for Information on Wireless Services in Rural Areas, (Dec. 11, 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-229402A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-229402A1.pdf).

customers. One of the factors that the Commission considers in determining if a licensee provided "substantial service" is whether or not service is provided to customers who previously had little or no access to the spectrum.<sup>45</sup> By using "substantial service" as a performance requirement, the FCC helps promote service to rural areas. By specifically recognizing the provision of rural service as a means of showing "substantial service," the Commission gives the licensee an incentive to build out its system in order to reach remote locations. However, this incentive quickly dissipates if a licensee can demonstrate "substantial service" in a variety of ways that may be more financially beneficial to the licensee.

"Substantial service" is also conducive to the policy of promoting service to niche markets. Niche market services are typically specialized and serve focused groups that are usually underserved by mainstream licensees because such services often generate a limited revenue base. Niche markets suffer from the same kind of disincentives that apply to rural areas. The "substantial service" requirement can be demonstrated by showing service to a niche market.<sup>46</sup>

Unlike service to urban areas, there are many unknown quantities in servicing rural and niche markets. Therefore, construction benchmarks are not as effective. "Substantial service" works particularly well in these situations because these services are unique. When "substantial service" is restricted by limitations on the way it can be satisfied (i.e., a licensee showing that it has provided "substantial service" to a rural or niche market), these particular policy goals can be furthered.

However, the Commission continues to apply "substantial service" to a broader scope of commercial radio services. The FCC's motivation for expanding the use of "substantial service" is the Commission's policy of flexible use. This opens the door for licensees to prove "substantial service" in a number of ways. This level of flexibility can be problematic because it becomes easier for a licensee to show "substantial service" without proving that they serviced either a rural area or niche market. Expanding the application of "substantial service" promotes more ad hoc review and less clarity as to what the term actually means. The process for reviewing a licensee's showing of "substantial service" illustrates this

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45. See Amendments to Parts 1, 2, 27 and 90 of the Comm'n's Rules to License Servs. in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Gov't Transfer Bands, *Report and Order*, 17 F.C.C.R. 9980, para. 73, 26 Comm. Reg. (P & F) 1110 (2002) [hereinafter *Gov't Transfer Bands*].

46. 47 C.F.R. § 101.1413(b)(1) (2002).

broad interpretation. The Commission has even stated that in regard to commercial radio service, it has "rarely found that a [licensee] has failed to meet its performance requirements."<sup>47</sup>

#### IV. FLEXIBLE USE: ALLOWING THE MARKET TO DETERMINE THE BEST USE FOR SPECTRUM

The FCC is currently promoting a market-based approach to spectrum allocation policy. The term used to describe this policy is "flexible use" of the spectrum. The Commission has been urged "[i]n order for competition to bring consumers the highest valued services in the most efficient manner, [that] competing users of spectrum need flexibility to respond to market forces and demands."<sup>48</sup> The type of flexibility includes licensees determining how much spectrum they need, to what geographic areas they will provide service, and how they will use the spectrum.<sup>49</sup> Supporters of flexible use argue that several benefits will flow from such use: (1) spectrum users will be able to respond quickly to the public demand for new services; (2) flexible use will allow the rapid introduction of innovative services; (3) flexible use will promote the transfer of spectrum to a party that values spectrum the most and will promote competition.<sup>50</sup>

This policy has led to the ever expanding use of "substantial service" as a benchmark requirement. Supporters of flexible use have found that the policy of "substantial service" promotes flexible use of the spectrum.<sup>51</sup> However, because of the ambiguity associated with the term, this result is uncertain. This Note does not take a position on whether a market-driven approach is a desirable policy. Rather, it examines whether "substantial service" promotes flexible use and whether there are any potential statutory or administrative law barriers to the FCC's application of "substantial service."

##### A. *The FCC's Standard of Review for "Substantial Service" Cases*

The rules for "substantial service" are contained in the service rules for each radio service. However, they are generally consistent, and therefore, what follows is a broad overview of the process. To determine if a licensee has shown "substantial service," the Commission reviews showings on a case-by-case basis.<sup>52</sup> To determine if the licensee provided

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47. *Facilitating Spectrum-Based Services*, *supra* note 6, para. 9.

48. Rosston & Steinberg, *supra* note 2, at 9.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Gov't Transfer Bands*, *supra* note 45, para. 73.

“substantial service,” the Commission will look at what type of service is provided and how many people were served. In its review, the Commission considers these factors: (1) “[w]hether the licensee’s operations service niche markets or focus on serving populations outside of areas serviced by other . . . licensees,” (2) whether the licensee provides service to populations with limited access to telecommunications services, and (3) “whether [there is a] demonstration of service to a significant portion of the population or land area of the licensed area.”<sup>53</sup> This is not an exhaustive list; the Commission has noted that “substantial service” can be met in other ways.<sup>54</sup>

If the licensee does not meet the “substantial service” test, it will not receive a renewal expectancy.<sup>55</sup> As this Note has already demonstrated, the definition and process of review for “substantial service” does not shed much light on the specific requirements demanded of a licensee. To elucidate what can constitute “substantial service,” three specific examples of “substantial service” showings by licensees are helpful. The first example is a licensee who provides service to an underserved market.<sup>56</sup> The second example demonstrates the use of a safe harbor as a means of achieving “substantial service.”<sup>57</sup> The third example is a licensee who demonstrates “substantial service” by showing the number of users serviced, its system build-out, and the services it offers.<sup>58</sup>

## *B. Examples of FCC Findings of “Substantial Service”*

### *1. Serving Underrepresented Customers*

In *Chasetel Licensee Corp.*, the FCC addressed whether a PCS broadband licensee met the “substantial service” requirements.<sup>59</sup> The established service requirements for renewal of the license were either service provided by the licensee to one-quarter of the population or “substantial service.”<sup>60</sup> The licensee demonstrated a showing of “substantial service” based on the digital wire service provided to Lincoln

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53. 47 C.F.R. § 101.1413(b) (2002).

54. *Gov’t Transfer Bands*, *supra* note 45, para. 73.

55. 47 C.F.R. § 22.940(1)(i) (2002).

56. *Chasetel Licensee Corp.*, *Order*, 17 F.C.C.R. 9351 (2002) [hereinafter *Chasetel Order*].

57. *Commco Technology, L.L.C.*, *Memorandum Opinion and Order*, 16 F.C.C.R. 19485 (2001) [hereinafter *Commco Order*].

58. *Cingular Interactive, L.P.*, *Order*, 16 F.C.C.R. 19200, para. 8 (2001) [hereinafter *Cingular Order*].

59. *Chasetel Order*, *supra* note 56.

60. *Id.* para. 2.

Memorial University.<sup>61</sup> The FCC determined that the licensee showed "substantial service" because the university was in an area that was likely to be underserved or not served at all.<sup>62</sup> Additionally, the FCC noted that the licensee provided a service called "College Town PCS" which allowed those in the university community to communicate with each other using PCS mobile phones.<sup>63</sup> The billing rate for this service was a flat rate, and there were no "mobile-to-mobile per minute charges."<sup>64</sup> The FCC characterized this service as a niche service of the type they envisioned when they adopted the policy of "substantial service."<sup>65</sup>

The Commission found that the licensee met two of the explicit standards used to evaluate "substantial service." First, the licensee demonstrated that it served a part of the population that did not have significant access to the spectrum. Second, the FCC determined that the licensee provided a niche service. Despite these two findings, the FCC noted that providing service only to an underserved university might not meet the "substantial service" requirement.<sup>66</sup> Although this order suggests that service to an underserved population will meet the "substantial service" standard, the FCC's accompanying comments show that service to an underserved population does not assure that the standard will be met. The statement does, however, reinforce that each licensee will be reviewed for "substantial service" on an ad hoc basis.

## 2. Safe Harbor

In a petition to deny Commco Technology's renewal request, the FCC granted the renewal and found the licensee had met the "substantial service" requirements.<sup>67</sup> For this license the FCC required "substantial service" but provided a safe harbor example build-out of "four links per million population within a service area."<sup>68</sup> The licensee demonstrated that its build-out met the safe harbor example, and the FCC denied the petitioner's request because the licensee's construction was identical.<sup>69</sup>

This example illustrates that a safe harbor acts much like a geographical or numerical benchmark. Because of the safe harbor example,

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61. *Id.* para. 6.

62. *Id.* para. 9.

63. *Id.*

64. *Id.* (footnote omitted).

65. *Id.*

66. *Id.*

67. *Commco Order*, *supra* note 57.

68. *Id.* para. 8.

69. *Id.*

Commco knew what kind of service it could provide in order to ensure renewal. Commco received its renewal because its service matched the safe harbor example. When safe harbors are used, they do not encourage the licensee to use spectrum as the licensee or the market chooses.

### 3. A Combination of Factors

In a declaratory ruling, the Commission found that the service planned by Cingular, which holds multiple licenses, would comply with "substantial service."<sup>70</sup> The issue before the Commission was whether Cingular was meeting the benchmark requirements of their 900 MHz licensees.<sup>71</sup> The FCC determined that in evaluating each individual license they would take into consideration the coverage provided to all of the users by the national network of licenses.<sup>72</sup> The Commission recognized several factors that supported a finding of "substantial service." Cingular agreed to provide service to at least thirty percent of the population and demonstrated that the other licenses it held had met or surpassed their benchmark requirements. In addition, "the service offering provided by Cingular Interactive [was] technologically sophisticated," and provided "a platform for . . . computer-aided dispatch, remote database access, and telemetry."<sup>73</sup> Based on the totality of these factors, the Commission found that Cingular's service would meet the "substantial service" requirements.<sup>74</sup>

The FCC also found that Cingular provided technologically sophisticated service to a high percentage of the population and noted that Cingular's national network allowed users in one license service area to use licenses in other service areas.<sup>75</sup> In addition, the Commission took into account Cingular's performance record for the many different licenses it held.<sup>76</sup> This declaratory ruling suggests that even in the context of a national commercial service provider, "substantial service" can be met if a high percentage of the population is served and the network provides a platform for emerging technologies. This example illustrates that "substantial service" is no longer applied only to niche markets.

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70. *Cingular Order*, *supra* note 58, para. 8. A licensee can ask the Commission, before it is time to demonstrate meeting the benchmark requirements, if their proposed services and build-outs will meet "substantial service." *Id.*

71. *Id.* para. 1.

72. *Id.* para. 7.

73. *Id.* para. 10 (footnote omitted).

74. *Id.* para. 11.

75. *Id.* paras. 7, 9-10.

76. *Id.* paras. 9.

As the FCC expands the application of "substantial service" in an effort to promote spectrum flexibility, more evaluative factors will be needed. For example, Cingular demonstrated "substantial service" for a variety of reasons. Additional factors will add to the confusion already surrounding "substantial service."

## V. THE PROBLEMS WITH "SUBSTANTIAL SERVICE" AND POSSIBLE SOLUTIONS

### A. *Why This Policy May Be Inconsistent with the Communications Act*

The FCC is required to regulate the spectrum so as to make access to adequate facilities and services available at a reasonable rate to the people of the United States.<sup>77</sup> The FCC's current policy of flexible use is aimed at achieving these goals. However, the uncertainty associated with a broad application of "substantial service" as a performance requirement could frustrate this goal. Therefore, the FCC needs to rethink using "substantial service" as a tool to promote flexible use and find a different way to accomplish its broad objectives and the requirements set forth in the Act.

Under the Act, a license cannot be property.<sup>78</sup> Today the FCC generally favors an auction method to distribute spectrum. It has been argued that auctions reintroduce the idea of property rights into the FCC's regulatory policy.<sup>79</sup> The FCC's current policy of flexible use and the ability to readily obtain a renewal also makes a license more like a property right. If "substantial service" allows licensees to be almost assured of gaining a renewal without having to make much of a service showing, the FCC is pushing the boundaries of what is allowed under the Act. If, however, "substantial service" is applied in a focused manner—for example, to encourage service to rural areas—this would be more consistent with the Act because it would promote one of the goals and would prevent the ambiguity that arises when "substantial service" is applied nonspecifically.

What constitutes "substantial service" is unclear. Theorists have concluded that "'regulatory uncertainty' makes owners less likely to invest in their property."<sup>80</sup> Here, if a licensee is unsure whether a new service it is

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77. 47 U.S.C. § 151 (2000).

78. 47 U.S.C. § 301 (2000).

79. Joseph M. Ward, *Secondary Markets in Spectrum: Making Spectrum Policy as Flexible as the Spectrum Market It Must Foster*, 10 COMMLAW CONSPECTUS 103, 110 (2001) (arguing that secondary markets increase the efficiency of spectrum allocation and result in spectrum being used to the highest potential uses).

80. *Id.* at 110 (footnote omitted).



contemplating providing would meet the "substantial service" requirements, then the risk may be too great to warrant capital investment. The uncertainty surrounding "substantial service" discourages investment in new services and technology. Moreover, this uncertainty encourages licensees to provide a service which is tried and true, not new and innovative.

*B. Why This Policy May Be Inconsistent with the Administrative Procedures Act*

All rules promulgated by the FCC must meet the standards provided in the Administrative Procedure Act ("APA").<sup>81</sup> A licensee denied renewal under a "substantial service" requirement might challenge that the "substantial service" requirement was so vague as to fail review under basic tenets of the APA. The licensee might argue that the FCC's decision was arbitrary and capricious.<sup>82</sup> This argument is plausible, as the definition of "substantial service" does not provide clear guidance. Instead, it places the FCC in the position of defining "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal"<sup>83</sup> on a case-by-case basis. If, for example, the FCC were to say that servicing ten percent of a license area is neither "sound" nor "favorable," this ten percent measurement is found nowhere in the "substantial service" definition but becomes a part of its interpretation. This construction could be reasonable, but it might be viewed as ad hoc rationalization. For example, if ten percent was found to meet a "substantial service" requirement in one situation but not another, it still could be reasonable. Ten percent coverage might be reasonable in a rural area but not in an urban area. Additionally, determinations on a case-by-case basis add further confusion to this already unclear standard by providing inconsistent or not readily reconcilable decisions.

Generally, these issues have not been explored. However, many of the licenses issued with a "substantial service" requirement will expire in the near future. The courts have not directly spoken to this issue but have indirectly addressed "substantial service." In *Benkelman Telephone Co. v. FCC*, a group of paging licensees challenged newly promulgated Commission rules which required, among other things, a showing of "substantial service" five years from the license date, or the license would

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81. 5 U.S.C. § 552 (2000).

82. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

83. 47 C.F.R. § 22.940(a)(1)(i) (2002).

automatically terminate.<sup>84</sup> The paging groups argued that "the 'substantial service' standard [was] too vague to permit the FCC to provide notice to licensees of license termination, as required under 5 U.S.C. § 558(c)."<sup>85</sup> The circuit court for the District of Columbia found that adequate notice was provided in the review process the FCC conducts before a license automatically terminates.<sup>86</sup> Therefore, the court never reached the "substantial service" argument.<sup>87</sup> Although "substantial service" was addressed in *Benkelman*, the court merely determined that adequate notice was provided in the review procedure for the cancellation process. In the issues presented *supra*, as opposed to the automatic termination challenge in *Benkelman*, the denial would be of a license renewal application. Therefore, the review procedure upon which the court relied does not apply to license renewal situations.

In *Cingular Interactive*, another "substantial service" challenge was before the Commission.<sup>88</sup> Cingular contended that it provided "substantial service" in its license markets.<sup>89</sup> Cingular argued that "because it could lose its license for failure to make a satisfactory service showing, 'fundamental fairness requires a clear enunciation of the components of substantial service.'"<sup>90</sup> The Commission rejected this argument because Cingular had previously sought a declaratory ruling that it had met the "substantial service" requirements and that the Commission had given them specific direction.<sup>91</sup> This Commission ruling differs from the issues presented above because in this case, Cingular was told specifically how it could meet "substantial service."

This FCC order and the *Benkelman* decision suggest that a procedural component may alleviate any notice problems associated with "substantial service." However, in a renewal situation, such procedural processes present problems. First, a declaratory ruling would restrict the licensee's use of its license. Second, a declaratory ruling or a midlicense evaluation could show that a licensee is not meeting "substantial service." In this situation, considering the time and capital expense required to cure a deficiency, the licensee may be unable to comply.

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84. *Benkelman Tel. Co. v. FCC*, 220 F.3d 601, 604 (D.C. Cir. 2000).

85. *Id.* at 606 n.6.

86. *Id.*

87. *Id.*

88. *FCI 900, Inc. Expedited Request for 3-year Extension of 900 MHz Band Construction Requirements, Order of Reconsideration*, 17 F.C.C.R. 16092 (2002).

89. *Id.* para. 1.

90. *Id.* para. 9 (footnote omitted).

91. *Id.* para. 10.

### C. *Solutions*

This Note has shown how the meaning of “substantial service” is uncertain. By using the policy of “substantial service” to promote flexible spectrum use, the FCC risks not achieving its goals and not meeting the guidelines of administrative law and the Act. Further, by the FCC expanding the ways in which “substantial service” can be shown, it is possible that “substantial service” will no longer effectively serve the policy goal it was able to promote—service to rural or underserved areas. The FCC should reevaluate how the term “substantial service” is used. This process could lead the FCC to any number of solutions to the many problems currently posed by “substantial service.”

First, to satisfy performance requirements, the FCC could retain “substantial service” but limit ways in which it can be shown. “Substantial service” is a good policy as applied to rural, underserved, and emerging technologies because it is unlikely that achievable preset benchmarks are readily ascertainable for those types of services. The FCC’s use of “substantial service” as a performance requirement in rural and niche markets is sound.

An alternative to this approach is for the FCC to stop using “substantial service” requirements and return to using construction benchmarks to meet the Act’s performance requirements. Such an approach would allow licensees to have assurance that the service they are providing will result in a renewal, thereby spurring licensees’ investment in their own service platforms.

An entirely different approach is to have no service requirement. This, however, would require legislative change. It is desirable because it would provide licensees with maximum flexibility to decide how they wish to use their licenses. This would better allow the FCC to achieve its policy of flexible use.

## VI. CONCLUSION

This Note has examined performance requirements and focused on the FCC policy of flexible use and “substantial service” as a performance requirement. Further, this Note has reviewed the license renewal process and the significance of performance requirements in this process. By reviewing the FCC’s past use of “substantial service” and how it is applied today to commercial radio services, the ambiguities associated with this term become apparent. “Substantial service” requirements are best suited for improving service to focused areas like rural or niche markets. Construction benchmarks provide more certainty and clarity than “substantial service” can, and they should be applied to promote readily

available services. As the FCC moves forward with new policies, such as flexible spectrum use, new principles should be developed rather than transplanting old policies like "substantial service" that do not readily fit into the new regulatory atmosphere. Therefore, the FCC should consider revising the way it is currently using "substantial service."

